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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2013-0086]

Implementation of a Program for Federal Recognition of State Managed Phytosanitary Programs

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that we are implementing the Federally Recognized State Managed Phytosanitary program, which establishes a process for States to petition the Animal and Plant Health Inspection Service (APHIS) for Federal recognition of State-managed phytosanitary programs developed to eradicate, exclude, or contain plant pests of limited distribution within the United States that APHIS is not currently regulating or is considering no longer regulating under a Federal program. APHIS will evaluate and consider recognizing a State phytosanitary program to control certain pests to determine whether we should continue to take a control action or begin to take a control action against such pests at our United States ports of entry to mitigate the risks posed by those pests when found in consignments of imported goods. This program will make our Federal control actions taken at the ports of entry concerning the dissemination and/or further infestation of certain plant pests more consistent with our control actions regarding the interstate movement of these same pests.

FOR FURTHER INFORMATION CONTACT: Mr. David B. Lamb, Regulatory Policy Specialist, RPM, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 851-2018; or Ms. Diane L. Schuble, National Coordinator for Official Control, Pest

Detection and Emergency Programs, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1237; (301) 851-2334.

SUPPLEMENTARY INFORMATION:

Under the Plant Protection Act, as amended (PPA, 7 U.S.C. 7701 et seq.), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry, or interstate movement of plants, plant products, or other articles if the Secretary determines that the prohibition or restriction is necessary to prevent a plant pest from being introduced into or disseminated within the United States. This authority has been delegated to the Administrator of the Animal and Plant Health Inspection Service (APHIS).

As part of this mission, APHIS' Plant Protection and Quarantine (PPQ) program responds to foreign introductions of plant pests by taking action at the ports of entry to eradicate, suppress, or contain them through various control programs to prevent their introduction or dissemination into the United States. Under Section 436 of the PPA, States are prohibited from regulating in foreign commerce any plant pests, plants, plant products, or other articles in order to control, eradicate, or prevent the introduction or dissemination of a plant pest or a noxious weed into the United States. Thus, States are preempted from taking action against any imported shipment entering and moving within the United States in foreign commerce on the basis that the shipment is infested with or by a plant pest or noxious weed. However, individual States may establish phytosanitary regulations and procedures to address pests of concern to them when those pests are moving in interstate commerce as long as the State's phytosanitary regulations are consistent with and do not exceed any PPA regulations issued by APHIS.

We recently advised the public that we have been and are continuing to assess certain plant pests that are present in the United States to determine whether we should continue to take

action to mitigate the risk posed by those pests when they are found in consignments of imported goods at ports of entry into the United States. We discussed this action in a notice published in the Federal Register on November 13, 2013 (78 FR 68020-68021, Docket No. APHIS-2013-0048).

To ensure that we are taking pest control action at the ports of entry only when such action is warranted, we are implementing a program, known as the Federally Recognized State Managed Phytosanitary (FRSMP) program, that establishes a process by which States may petition APHIS to recognize State managed phytosanitary programs developed to eradicate, exclude, or contain a plant pest that is of specific concern to that State and is of limited distribution within the United States. APHIS will consider petitions for State-managed phytosanitary programs that seek to exclude a pest from a State where it is not present, and where economic or environmental harm could result from its introduction. APHIS will also consider petitions for State-managed phytosanitary programs that seek to contain or eradicate plant pests that are of specific concern to that State and are of limited distribution in the United States and are also not currently regulated by APHIS. After review of the phytosanitary program information provided by the requesting State, APHIS will decide whether to continue taking any control action at ports of entry to mitigate the risk associated with the specific plant pest if found in shipments in foreign commerce. Federal recognition of a State's phytosanitary program is consistent with APHIS' PPA authorities and APHIS' compliance with International Plant Protection Convention guidelines.¹

APHIS will begin accepting and considering petitions from States interested in obtaining Federal recognition in the FRSMP program. In order to help States decide whether to petition

¹ International Standard for Phytosanitary Measures No. 5, Supplement No.1, "Guidelines on the interpretation and application of the concepts of "official control" and "not widely distributed."

for such recognition in the FRSMP program, a State can request APHIS to provide a report to the State listing pest interceptions in imported cargo for shipments destined to that State and can also request from APHIS port of entry information on specific pest interceptions for the prior 5 years. To be eligible for FRSMP recognition, a State will be required to demonstrate in their petitions that they meet the following criteria² established by the FRSMP program:

- A State must provide detailed information about the absence or limited distribution of a pest in the State, pest pathways and likelihood of introduction into the State, potential economic and environmental harm that the pest may cause in the State, and the State's regulatory program for the pest that includes monitoring, surveillance, and control methods.
- A State must provide evidence that it has the authority to control the pest and to restrict activities and articles that facilitate the movement of the pest in the State that is not under Federal quarantine. This can be demonstrated by indicating that the State either has a regulatory quarantine in place to maintain pest freedom or limit pest distribution in the State or has the commitment and capability to enact, implement, and enforce a State regulatory quarantine within a reasonable time.
- A State must also present evidence to APHIS that its control program is technically sound with regard to pest containment and ability to measure results. For instance, a State must show that its mitigation measures are the least restrictive necessary to assure adequate protection and that a quality assurance process exists to measure the effectiveness of such mitigation measures. A State must also provide APHIS with an annual report showing evidence that the phytosanitary management of its program is effective and reliable.

² The criteria are included in the FRSMP manual available at:
http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/frsmp.pdf.

- Finally, a State must be able to define and describe its control program and provide supporting documentation including compliance agreements, auditing reports, and maps defining the regulated areas within the State.

Upon receipt of a petition from a State requesting Federal recognition of its phytosanitary program, that is, requesting to be approved to participate in the FRSMP, APHIS will review the petition, evaluate it using the criteria cited above, and notify the requesting State of our decision. Petitions that fail to fulfill the FRSMP program criteria will be returned to the submitting State and the State will have the option to revise and resubmit its petition.

If we decide to recognize a State program as being part of the FRSMP, APHIS may continue to or begin to take Federal control actions at the United States ports of entry if this pest is intercepted in consignments of imported goods. Presently, when a plant pest of concern is found in a shipment of an imported commodity at a port of entry, APHIS requires mitigation or remedial actions to be taken, such as phytosanitary treatment, re-exportation, or destruction of the infested commodity. Once the FRSMP program begins and if APHIS determines to take Federal action on specific State petitioned FRSMP program plant pests, APHIS will likewise require such remedial measures on a commodity shipment infested with a FRSMP program pest that APHIS has decided to take control action on. Additionally, APHIS may decide to allow an additional remedial option for a shipment involving a FRSMP program plant pest if that shipment can be adequately mitigated or safeguarded to enter into the United States without any phytosanitary mitigation treatment when APHIS determines that the shipment is destined to, or can be re-directed to, a State that does not restrict that pest under the FRSMP program. In such a case, where an infested shipment infested with a FRSMP plant pest is allowed entry without

phytosanitary treatment, APHIS may decide to issue an Emergency Action Notification ordering restrictions on the movement and destinations of that infested commodity shipment.

APHIS, in its discretion, may decide to implement provisional FRSMP program status for a phytosanitary pest upon receipt and preliminary review of a State's FRSMP petition. If APHIS decides to implement provisional FRSMP program status for a phytosanitary pest, APHIS may require remedial action on that pest when it is detected arriving in or destined for the petitioning State(s) during the period that APHIS is finalizing review of that State's FRSMP petition. However, Federal collaborator status will not be conferred on a petitioning State agency until the petition is formally approved, which means no Federal authority will be delegated to a State to act upon the FRSMP program pest while that phytosanitary pest is in provisional status.

The provisional FRSMP program status for a phytosanitary pest will not exceed 60 days from the implementation of that provisional status unless APHIS determines it should be extended and the requesting State wants such status extended. Likewise, APHIS may determine at any time that the provisional status be extended or withdrawn as necessary. For example, APHIS may extend a provisional status when a State is requested to submit additional information regarding their specific FRSMP petition. Provisional status may be withdrawn if the petition is denied, when a State notifies APHIS of its intent to withdraw from the petition process, when a State fails to complete the petition within the agreed upon time schedule, or a State no longer wants APHIS to take any control action against a specific phytosanitary pest.

As explained above, the States are preempted under the PPA from taking any phytosanitary plant pest control actions on shipments moving in foreign commerce. Nevertheless, in order to make the FRSMP program operative and workable, APHIS has decided

that it will enter into Federal cooperative arrangements with States that have recognized FRSMP program plant pests, in accordance with 7 U.S.C. 450. Under these envisioned cooperative arrangements, the Secretary of the U.S. Department of Agriculture will authorize States that have been accepted into the FRSMP to operate as Federal collaborators to administer and enforce Federal actions on commodity shipments infested with a FRSMP pest that is entering the United States and moving in foreign commerce³ and as the result of such foreign commerce movement is found to be in that FRSMP State. States are obviously prohibited by the PPA from acting in such a Federal regulatory capacity unless such a cooperative arrangement is in place conferring Federal authority upon them to do so by the Secretary of Agriculture. Under these envisioned cooperative arrangements, States may be authorized to administer and enforce control actions to prevent the entry or movement of a specified FRSMP plant pest into or through their State only as Federal collaborators acting under the Federal authority conferred by the cooperative arrangement. APHIS does not confer any authority under the Plant Protection Act not specifically outlined in the cooperative arrangement and is not conferring authority under any other statute administered by APHIS, including the authority to establish and collect fees.

APHIS will monitor those States that have been authorized to act as Federal collaborators to ensure they are complying with the terms of the collaborative arrangement and the FRSMP program criteria. Failure of a State to meet the FRSMP program criteria will result in APHIS reconsidering the FRSMP program eligibility of that State program and the approval of any cooperative arrangement.

In cases where a State is no longer interested in taking action against a FRSMP pest and APHIS can no longer justify continued action against such a FRSMP pest, APHIS will

³ Articles imported into the United States under the authority of the PPA would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis.

discontinue taking Federal control actions, if APHIS has any such actions in place, when such FRSMP pests are intercepted at the United States ports of entry.

Additional information about the FRSMP program is available on the APHIS Web site at http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/importexport?1dmy&urile=wcm%3apath%3a%2Faphis_content_library%2Fsa_our_focus%2Fsa_plant_health%2Fsa_domestic_pests_and_diseases%2Fsa_frsmpr.

Done in Washington, DC, this 26th day of September 2014.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2014-23386 Filed 09/30/2014 at 8:45 am; Publication Date: 10/01/2014]